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Supreme Court, U.S.
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No. 99-479

In the

Supreme Court of the United States

ELIZAPHAN NTAKIRUTIMANA,

Petitioner,

v.

JANET RENO, as Attorney General
of the United States;
MADELEINE ALBRIGHT, as Secretary
of State of the United States; and
JUAN GARZA, as Sheriff of Webb
County, Texas,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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1. Extradition Can be Authorized Only By Treaty. The argument of the Federal Respondents ignores the direction of SC Res 955, para. 2 (A-128) that Member nations "...shall take any measures necessary under their domestic law to implement..." its provisions by citing only the provision that Member states shall "...cooperate fully with the International Tribunal..." See Res. Br. at 2. That direction should have informed respondents that the U.S. must enter into a treaty to authorize extradition as it always had done in the past.

Instead, respondents chose to ignore the words of the Treaty Clause and its role in the structure of the Constitution, which either grants exclusive power to the President to enter into agreements with foreign nations with the advice and consent of the Senate in matters regarded as proper subjects of negotiations and treaty at the time, or dangerously divides constitutional power over foreign relations between the legislative and executive branches. Respondents also continue to ignore the debates in the Constitutional Convention and arguments in the Federalist papers urging ratification of the new charter which leave no doubt that the Founders intended as a matter of highest importance to place the treaty making power exclusively in the President with Senate approval.

To justify their claim to power to extradite petitioner in the absence of a treaty, respondents rely on dicta from three cases which they misconstrue.

Terlinden v. Ames, 184 U.S. 270 (1902), Grin v. Shine, 187 U.S. 181 (1902) and Valentine v. U.S., 299 US 5 (1936), all involved and dealt exclusively with extradition treaties. None support the power of Congress to authorize extradition in the absence of a treaty in their holding, or in dicta. All three refer to the power of Congress to implement extradition treaties by legislation. None approved extradition in the absence of a treaty. Valentine was analyzed in petitioner's Reasons for Granting the Writ at pp. 6, 14-16. Terlinden refers once in passing to legislative power to implement a treaty, but never discussed it.

Grin was quoted out of context by respondents at p. 11 of their brief. The preceding sentence approved a general statute, sec. 5270, which eliminated formal treaty requirements

for authenticated copies of warrants of arrest in all treaties. Grin, 187 U.S. at 191.

It was reasoned that eliminating a burdensome treaty requirement *for* a foreign government seeking extradition from the U.S. involving foreign law and procedure that the judiciary could not meaningfully evaluate is within the power of Congress. The Court acknowledged that legislation adding requirements to a treaty could require negotiations of new treaty provisions. Id.

The sentence that follows respondents' quoted dicta notes that sec. 5270, "is applicable to all foreign governments with which we have treaties of extradition." Id.

The Court thus clearly restricted the meaning of the sandwiched sentence quoted by Respondents when read in context to Congressional enactments implementing existing, or future treaties and negates the independent power of Congress to legislate extradition in the absence of a treaty.

Respondents fail to address the discussion and decision of the Court in the first extradition (A119-121), or the lengthy and compelling analysis of the dissent in the Court of Appeals (A22-38) both finding extradition can be authorized only by a Treaty.

Respondents concede that "... Valentine, Grin and Terlinden did not involve challenges to legislation authorizing extradition..." Res.Br. at 11-12. They go on to erroneously claim "... no court of appeals has reached a contrary conclusion," failing to note that no court of appeals has affirmed their unprecedented claims of power to ignore the Treaty Clause. In Then v. Melendez, 92 F.3d 851, 853 (9th Cir. 1996), the Court of Appeals, clearly focusing on the exclusive nature of the Treaty Clause, albeit in dicta, wrote:

> The advice and consent of the Senate is a constitutional prerequisite to a valid treaty, and the executive branch does not have the power to extradite alleged criminals absent a valid extradition treaty.

Respondents seek to read out of the Constitution and the Treaty Clause any exclusive delegation of power in Article II to enter into agreements with foreign governments involving

any subject matter. See, Res.Br. at 13.

It is critically important now that the Court address the role of the Treaty Clause in the Constitutional design, because of the executive claims of power to enter into any contract with foreign governments by executive agreement, or executive agreement with the express, or implied authorization of Congress.

Here, an executive agreement to extradite to an international tribunal was addressed by Congress without committee consideration, committee reports, or committee, or floor debates by floor amendment to the National Defense Authorization Act for FY 1996 and "got slipped into law through the back door, without any public discussion or debate about its substantive merits." DeMoss, CJ, dissenting. A-27.

Could the executive have used this same tactic to seek approval of the Comprehensive Test Ban Treaty which was defeated on the floor of the Senate in October 1999?

2. The Failure To Apply The Gates Probable Cause Standard In Extradition Proceedings Merits Certiorari Review. The government purports to acknowledge that the Gates "totality of the circumstances" standard should control the probable cause determination in extradition cases, see Res.Br. at 13. It sees no need for certiorari review to clarify this standard because "...it is settled that the probable cause standard that the judicial officer applies in extradition proceedings is the same probable cause standard that a judicial officer applies in other contexts...," citing four decisions of this Court, all antedating Gates and three Court of Appeals cases, two decided after Gates, Lopez-Smith v. Hood, 121 F.3d 1322, 1324 (9th Cir. 1997), and Bovio v. United States, 989 F.2d 255, 258-259 (7th Cir. 1993). Neither of these two cases cites Gates or addresses the nature of the probable cause standard in extradition proceedings. Neither provides any basis for the government's facile assurance the standard is "settled." To the contrary, Lopez-Smith, in considering the question whether mental incompetence was a defense to extradition, noted the absence of an analytic framework and

lack of authority despite early decisions of this Court, 121 F.3d at 1325:

> Because Charlton [v. Kelly, 229 U.S. 447 (1913)] and subsequent authority compare an extradition hearing to a preliminary hearing, we have searched for authority on whether a preliminary hearing may result in a decision binding over the defendant, where he is incompetent to assist in his defense. Oddly, despite the frequently repeated proposition that extradition is like a preliminary hearing, neither side has cited any authority, and we have found none, providing an answer to this question. Thus the comparison to a preliminary hearing has turned out to be a blind alley, for purposes of answering the question before us.

In the present case as in virtually all federal extradition proceedings probable cause determinations are being incorrectly made in disregard of the Gates "totality of the circumstances" standard.

The government claims the second extradition officer, who found probable cause after the first had deemed it lacking,[1] "considered the totality of the circumstances" in

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[1] The government mistakenly asserts that its second request for petitioner's surrender, filed after the first request was rejected, "added two new declarations in response to the magistrate judge's concerns about the sufficiency of the evidence." Res.Br. at 8. In fact, only one new declaration, addressing essentially procedural points, was filed with the second request, by an Assistant Trial Attorney in the Office of the Prosecutor, dated January 26, 1998. A second supplemental declaration, dated May 13, 1998, was later filed by the Investigator whose initial declaration had been held insufficient by the magistrate judge. It was filed not in response to the magistrate judge's concerns, but only after petitioner raised serious questions, which to date have not

making his probable cause determination, Res..Brief at 14.

But it's clear from the District Court's opinion that it neither assessed "the totality of the circumstances" nor thought its determination of probable cause required such an assessment. In assessing probable cause the district court accepted various restrictive rules on "an extraditee's ability to offer evidence" bearing on probable cause, A-89, as for example that a fugitive is not allowed to offer evidence that goes simply to his defense, id., that an extraditee's right to introduce evidence is limited to evidence which explains rather than contradicts the demanding country's proof, id., that what tends to obliterate or negate probable cause may be considered but not what merely contradicts it, A-90, see also A-98, excluding pertinent evidentiary contentions of petitioner on the ground they were not attempts to "explain" the government's evidence, that whether and the extent to which extradition judges may consider challenges to the credibility and reliability

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been satisfactorily answered, about the bona fides of the Investigator's initial declaration, set forth in part in Appellant's Fifth Circuit Brief at 39-40 and Reply Brief at 23-27. The Investigator was a Dutch police officer the Tribunal employed for six months ending in August 1996, when he returned to Holland. The Tribunal presented no physical or documentary evidence against petitioner -- not even a witness statement -- in support of its two requests. The Tribunal's sole proof against petitioner was the Investigator's initial declaration which purported to present witness statements second and third hand in a narrative by the Investigator. Since the Investigator's declaration was the alpha and omega of the Tribunal's two attempts to show probable cause, its lack of credibility and unreliability as well as the many sources of unreliability in the investigation and interviewing of witnesses are circumstances which should powerfully affect the Gates analysis of probable cause in petitioner's favor and were not adequately taken into account by the district court, which as is discussed infra, mistakenly thought it was required to shy away from considerations of credibility and reliability.

of the government's proof is unclear, A-91, and that challenges to the reliability of translations, if permitted at all, A-94, must not involve substantial inquiry, A-94-95. In applying rules with respect to translations developed in factually dissimilar cases the district court failed to take into account as part of the totality of circumstances the unique and extraordinary background of political, logistical and other factors in this case in which unscreened, unsworn interpreters, all probably Rwandan Tutsis, simultaneously translated both sides of interviews in the field about horrific events occurring three years earlier well-known to the persons being interviewed who were personally affected and involved, in a climate which has remained to date highly politicized, emotional and contentious.

Our research has found only a handful of extradition cases that cite Gates or refer to the "totality of the circumstances" in assessing probable cause. It is the near universal practice in federal extradition proceedings to apply restrictive rules that arbitrarily limit the circumstances that can be considered in assessing probable cause. As a result the federal probable cause standard that should control is being rejected or ignored in virtually all extradition cases. Because the lower courts view this practice as required by decisions of this Court, all of which antedate Gates, the practice will continue unless there is corrective action by this Court.

3. The U.N. Charter Does Not Confer Power On The Security Council to Create an International Criminal Tribunal. The history, structure and text of the Charter, as well as fifty years of practice negate the existence of power in the Security Council to create an international criminal tribunal. Had the Charter contained such power it would never have been approved. The permanent members of the Security Council would have been the first to reject it.

The International Court of Justice with its extremely limited powers to consider disputes among consenting Member nations was established by the Charter and its Statute attached to the Charter. The Statute can be amended only by the same procedures required for amendment of the Charter itself.

The use of a multinational treaty to create the International Criminal Tribunal approved by 122 nations in Rome in July 1998 further evidences the lack of power in the Security Council, save by amendment to the Charter, to create such a Court.

The U.N. Charter is itself a multinational treaty. Respondents have never faced this truth. As a treaty duly ratified pursuant to Article II of the Constitution it is part of the supreme Law of the Land. As part of its law, U.S. courts have no alternative but to determine, insofar as conduct by the U.S. government and rights of persons before them are concerned, whether acts by the U.N. and its organs are authorized by the Charter of the United Nations. Doctrines of abstention, non-inquiry and non-review of political questions, are no more applicable to violations of treaty powers which are part of U.S. law than they are to claims that legislation by Congress, or acts by the Executive exceed their authority under the Constitution and laws of the U.S.

The Charter of the United Nations does not define the U.N. to be a sovereign nation as respondent contends, but an international organization created by means of a multinational treaty to which the U.S. is a party. Analogies to cases in which the U.S. courts have declined to consider whether a foreign sovereign is to be recognized by the U.S., or whether actions of a foreign sovereign conform to its laws are not relevant to the Charter of an international organization which by treaty is part of the supreme Law of the Land.

The importance of judicial review to the integrity of the Constitution of the United States is reinforced by the absence of any recognized legal restraint on actions by the U.N. and its organs. Judicial review by the International Court of Justice of the legality under the U.N. Charter of acts by U.N. organs was rejected during the drafting of the Charter. At the San Francisco conference "the proposal to confer the point of preliminary determination [of each organ's competence] upon the International Court of Justice was rejected. The view was preferred that each organ would interpret its own competence." See, The Development of International Law Through the Political Organs of the United

Nations, Rosalyn Higgins, later a Judge of the ICJ (1963).

John Foster Dulles, in his memoir, War or Peace, in 1950 expressed the view that there are no legal limitations on Security Council power. "The Security Council is not a body that merely enforces agreed law. It is a law unto itself... No principles of law are laid down to guide it, it can decide in accordance with what it thinks is expedient."

This remarkable view is even more remarkably confirmed by Mohammed Bedjaoui, President of the International Court of Justice in his book, The New World Order And The Security Council, Dortrecht (1994). He demonstrates that the Security Council has interpreted its powers as being above the law and beyond any system of legal limits. He writes that whatever the Security Council does is ipso facto legal. He observes that the Security Council has consistently rejected any limits on its powers.

If unchallenged, this concept of unreviewable Security Council power means that the most powerful international organ created by the Charter of the United Nations "to end the scourge of war" is above all laws, domestic and international.

4. The ICTR Is Not Able To Assure Fair Trials. The record amply demonstrates the incapacity of the ad hoc ICTR to provide fair trials, as well as the dysfunctional condition of the Tribunal. The dependancy of the Tribunal on cooperation from the government of Rwanda which controls nearly all witnesses and evidence was once again demonstrated in November 1999 when Rwanda suspended cooperation with the ICTR on November 6 and later refused the Tribunal's prosecutor a visa to enter Rwanda, notwithstanding that the prosecutor had an office in Kigali, Rwanda and the ICTR depends on its ability to obtain witnesses and evidence free from threats, coercion, or interference by the government of Rwanda.

The New York Times reported the action in its opening two paragraphs as follows:

> NAIROBI, Kenya, Nov. 22 – Rwandan officials, angered that charges against a top

> genocide suspect have been dropped, have refused to grant a visa to the prosecutor of the United Nations tribunal investigating the massacres of at least 500,000 people in Rwanda in 1994.
>
> The decision was more evidence of deteriorating relations between the Rwandan government and the tribunal since charges against the suspect, Jean-Bosco Barayagwiza, were dropped early this month. These tensions may make the remaining prosecutions far more difficult. NY Times, November 23, 1999 at p. A9.

Four days later, the Tribunal's Appeals Court suspended for seven days its own order releasing Barayagwiza to provide time for its review. The Tribunal's spokesman said, "I think it is safe to say the last has not been heard in the Barayagwiza affair." ICTR Internews Reports, Nov. 26, 1999 (www. internews.org). If the Court of Appeals affirms its original decision, even the erratic cooperation of Rwanda with the ICTR prosecution may be lost, impairing its ability to secure witnesses and evidence, however unreliable, from Rwanda. If it reverses itself, it will at least appear to have yielded to pressure from the government of Rwanda. The keen interest of the government of Rwanda in convictions by the ICTR is again confirmed.

The government of Rwanda relented on December 3, 1999 and agreed to grant a visa to the prosecutor "... a week after she asked judges to reconsider their decision" to release Barayagwiza. NY Times, Dec. 4, 1999, p. A4. Cooperation with the ICTR by the government of Rwanda remains suspended and Rwandan authorities had not met with the Tribunal's prosecutor as of December 6, 1999, her third day in Kigali. PANA 6-Dec-99 8:25 PM EST. The Tribunal has not yet decided whether to reverse its order. Whatever happens it is safe to say the last dispute between the Rwandan government and the Tribunal has not been heard.

Whatever effect these developments may have on the ability of the ICTR to continue its work, the total inability of

defendants to find and secure witnesses and evidence from within Rwanda remains the same.

The government of Rwanda has simultaneously demanded that the ICTR extradite Barayagwiza to Rwanda. There he would join 120,000 Hutus imprisoned since 1994, nearly all without formal charges. He might also join the several hundred men who have been tried and condemned to death.

Petitioners have shown that the rule of non-inquiry into the legality and procedures of a foreign government relied on by respondents does not apply even in the case of extradition treaties between sovereign nations where fundamental international human rights, or the constitutional rights of a person in U.S. custody cannot, or will not, be protected by the requesting government. See, Petition at 26-30.

To whatever degree rules of non-inquiry may apply to an extradition pursuant to treaty between sovereigns, they can not apply to the surrender of a person in U.S. custody by political officers of the United States to the United Nations pursuant to an executive agreement entered into under the U.N. Charter. As a multinational treaty creating an international organization, the U.N. Charter is part of the supreme Law of the Land. U.S. actions pursuant to U.N. directives which impact directly on the U.S., or persons within the U.S., must assure full protection of U.S. law.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: December 7, 1999

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